In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-810

CINDY CALDWELL, a minor, by her father and next friend, WILLIAM J. CALDWELL, for the benefit of PATRICIA ROBIN BENSON and RAYMOND W. BENSON,

Petitioners,

vs.

SOUTHEAST TITLE AND INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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Petitioners, CINDY CALDWELL, a minor, by her father and next friend, WILLIAM J. CALDWELL, for the benefit of PATRICIA ROBIN BENSON and RAYMOND W. BENSON, pray that a Writ of Certiorari issue to review the decisions of the Supreme Court of the State of Florida entered in this case on April 16, 1975 and on Rehearing dated October 1, 1975 as well as the decision of the District Court of Appeal of the State of Florida, Fourth Judicial District, entered May 21, 1973.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth Judicial District, was entered May 21, 1973. It is incorporated in the appendix. Following

that opinion, in order to exhaust all state remedies, a Petition for Certiorari to the Supreme Court of the State of Florida was properly filed by the Respondent, Southeast Title and Insurance Co., and a Cross-Petition for Writ of Certiorari was properly filed by the Petitioners herein. On April 16, 1975, an opinion was entered by the Supreme Court of Florida discharging the Writ of Certiorari which was granted as to the Petition and Cross-Petition. The Supreme Court held that the Writ had been improvidently granted, one Justice dissenting. Petitions for Rehearing and Cross-Petitions for Rehearing were filed and granted and on October 1, 1975 an opinion was rendered on the Rehearings adhering to the original Order of April 16, 1975. The Writ of Certiorari has been discharged. The two opinions of the Supreme Court of Florida have not as yet been reported. All of the aforementioned opinions are reprinted herein as an Appendix.

PREFACE

For the Court's convenience, the Clerk of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, who is in possession of the record of this case has been directed to transmit the record to the Clerk of this Honorable Court in accordance with Supreme Court Rule 21.2. Various references will be made to this record but the Appellate Court opinions have been reprinted herein as an Appendix.

The following symbols will be used:

A—Appendix to this Petition for Writ of Certiorari

R—Record on Appeal

TR—Transcript of trial testimony contained in the Record on Appeal

JURISDICTION

The decision of the District Court of Appeal was entered May 21, 1973. In order to exhaust their state remedies and to ascertain that the opinion had, in fact, been rendered by the highest Court of a state in which a decision could be had, the Petitioners cross-petitioned the Supreme Court of Florida for a review by writ of certiorari. See *Banks* v. *State of California*, 395 U.S. 708 (1969). It has now been ascertained that the Petitioners have exhausted their state remedies and the jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

I

HAVE THE PLAINTIFFS BEEN DEPRIVED OF DUE PROCESS OF LAW IN VIOLATION OF AMENDMENT XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION?

II

HAVE THE PLAINTIFFS BEEN DEPRIVED OF THEIR RIGHTS UNDER AMENDMENT VII OF THE UNITED STATES CONSTITUTION TO A TRIAL BY JURY ON THE ISSUE OF PUNITIVE DAMAGES?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV, SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This case has traversed from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida through the District Court of Appeal, Fourth District, by direct appeal and cross-appeal and then proceeded to the Supreme Court of Florida on a Petition for Certiorari filed by the Defendant, Southeast Title and Insurance Company and a Cross-Petition for Certiorari filed by the Plaintiff, Cindy Caldwell, a minor, by her father and next friend, William J. Caldwell, for the benefit of Patricia Robin Benson and Raymond W. Benson. The Supreme Court of Florida accepted jurisdiction of the case. However on October 1, 1975 it finally ruled definitively that it would uphold the decisions of the Trial Court and the District Court of Appeal.

The Plaintiff, Cindy Caldwell, filed her Complaint against the Defendant, Southeast Title and Insurance Company, on July 26, 1971 alleging negligence (Count I) and bad faith (Count II) on the Defendant's part in refusing

to settle a previous personal injury action filed against Cindy Caldwell by the use Plaintiffs, Patricia Robin Benson and her father, Raymond W. Benson. (R-1-17) Any recovery in this action is to inure to the benefit of the originally injured individuals, Patricia Robin Benson and her father, Raymond W. Benson. An Answer was filed August 13, 1971 denying the Plaintiff's allegations of negligence and bad faith and setting forth certain Affirmative Defenses. (R-18, 19) The case proceeded to trial on March 20, 1972. At trial the evidence disclosed that the Defendant's actions were of such a deceitful and malicious character that a jury might properly award punitive damages. Therefore, prior to the close of the Plaintiff's case in chief, Plaintiff's counsel moved the Trial Court for leave to amend the Complaint to seek punitive damages pursuant to Florida Rule of Civil Procedure 1.190(b). (TR-503-508) The Motion to Amend was denied. (TR-508, 509)

At the close of the Defendant's case, Plaintiff's counsel specifically requested the Court to allow the jury to consider awarding punitive damages in light of the evidence of maliciousness and fraud on the Defendant's part without the need for amending the pleadings. (TR-557, 558) This motion was also denied. (TR-558) Throughout the Trial Court proceedings and the Appellate Court proceedings, the issues of Plaintiff's rights to procedural due process and to a trial by a fair and impartial jury on the issue of punitive damages have been inexplicably interwoven with Plaintiffs' position that they were entitled to jury consideration of the punitive damage claim.

The case was presented to the jury and on August 23, 1972 a verdict was returned for the Plaintiffs in the amount of $180,000.00 plus interest at the legal rate from August 31, 1970. This award was solely for compensatory damages and no punitive damages were allowed to be

awarded. (R-93) On the same day a Final Judgment was entered. (R-94) After post-trial motions had proved unsuccessful, the Defendant filed its Notice of Appeal (R-102) and Assignments of Error (R-103, 104) to the Fourth District Court of Appeal on October 10, 1972. On October 16, 1972 Plaintiffs filed their Cross-Assignments of Error alleging error on the part of the Trial Court in denying the Plaintiffs' motions.

On May 21, 1973 the District Court of Appeal entered a per curiam affirmance of the Trial Court's actions. Subsequently, both parties filed Petitions for Writs of Certiorari to the Supreme Court of Florida. By Order of December 20, 1973, the Florida Supreme Court accepted jurisdiction of the cause. On October 1, 1975 it discharged the writ it had previously granted and upheld the lower court decisions.

This bad faith-negligence case was filed by Cindy Caldwell, the Defendant's insured, after a Final Judgment was rendered against her for $205,000.00 as the result of a personal injury action filed by the two "Use Plaintiffs", Patricia Robin Benson and Raymond W. Benson. The evidence at trial disclosed that the original personal injury action—Case No. 68 C 4322, Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County—was filed as the result of a water skiing accident on Lake Osborne in Palm Beach County. Patricia Benson, who, at the time of the accident, was ten years of age (TR-418), was seriously injured. The attorney who represented Southeast Title and Insurance Company and Cindy Caldwell in the personal injury litigation, Mr. Kirk Sullivan, advised the Defendant over one and a half years prior to the original trial that this was a "major case". (TR-204) Patricia Robin Benson had very nearly lost her life in this accident. (TR-223; Plaintiff's Exhibit No. 11) Numerous depositions

were taken in that personal injury action. Even the earliest depositions disclosed the seriousness of the injury Patricia Benson sustained. Mr. Sullivan, the Defendant insurance company's counsel in the original lawsuit, was well aware of the magnitude of Patricia Benson's injuries. He knew she had, as a result of Cindy Caldwell's ski rope being wrapped around her neck, lost her ability to speak normally for the rest of her life. By letter of May 12, 1970, Mr. Sullivan related to the Defendant's claim manager these facts. Both Mr. Sullivan and the Defendant's claim manager rejected any thought of requiring a compulsory physical examination since the medical evidence appeared unimpeachable. (TR-185, 232) In fact, Mr. Sullivan agreed to refrain from taking Patricia Benson's deposition in view of the seriousness of her physical injuries and the resulting psychological problems she was experiencing. (TR-228, 229; Plaintiff's Exhibit No. 13)

The evidence disclosed that from the very earliest stages of the personal injury litigation, Mr. Sullivan had advised the Defendant's claim manager that this was "an obvious case of liability"—that is, that the jury would very likely hold Cindy Caldwell responsible for Patricia Benson's injuries. (TR-233) Depositions of witnesses to the accident quickly established in Mr. Sullivan's mind that in all probability a jury would conclude that Cindy Caldwell was attempting to go on one side of the ski ramp on which Patricia Benson was reclining while the boat pulling her was going on the other side. (TR-212) Cindy Caldwell had given a statement to that effect herself. (TR-206, 207) Furthermore, deposition testimony clearly established that Cindy Caldwell knew Patricia Benson was on the ski ramp when she attempted this maneuver. (TR-217) All of this information was conveyed to the Defendant's claim manager along with Mr. Sullivan's views that he was convinced that Cindy Caldwell

"was negligent in the manner in which she was skiing". (TR-210-212; Plaintiff's Exhibit No. 9; TR-217, 218)

On April 7, 1970, the Defendant was advised that the Trial Court had ruled that Lake Osborne was a navigable waterway and that, therefore, admiralty law governed the case and that the defense of contributory negligence no longer applied. (TR-32-34; Plaintiff's Exhibit No. 12) Therefore, even the slim defense of contributory negligence under Florida law against a ten-year-old child was taken from Cindy Caldwell when the Trial Court ruled that Lake Osborne was a navigable waterway. (TR-293, 294) Mr. Sullivan advised the Defendant that the realistic probabilities were that Cindy Caldwell was going to be held responsible. (TR-226, 361) From the very start, however, the Defendant took the position that it would not settle the case despite Mr. Sullivan's statements regarding liability and injuries. (TR-218, 226, 233, 370)

The evidence disclosed that an initial reserve of only $500.00 was set up by the Defendant in 1969 (TR-527) and despite several letters written throughout the pretrial discovery process by Mr. Sullivan, the Defendant never re-evaluated this minimal reserve until after the Final Judgment was rendered for $205,000.00 against its insured. (TR-527, 528)

Indeed, although the Defendant knew that Patricia Benson's medical expenses were above $7,000.00 (TR-241, 363; Plaintiff's Exhibit No. 16) and although it knew she had permanently lost her ability to speak normally (TR-230, 231; Plaintiff's Exhibit No. 14), and although its own attorney had continuously stated that in his opinion a jury verdict would be returned against its insured, the Defendant continually refused to offer anything more than $5,000.00 to settle this case. (TR-241, 363) This settlement offer was, of course, quickly rejected by Patricia Benson's

attorney (TR-241) as the Defendant's attorney had stated it would be. (TR-240)

The only justification asserted by the Defendant for its continual refusal to offer to settle the case against its insured was that Mr. Sullivan had advised them that he had a technical point of law upon which he hoped to hold invalid any judgment rendered against Cindy Caldwell. This point of law was that Cindy Caldwell was a minor and he felt that service of process had not been properly perfected upon her. Additionally, Mr. Sullivan felt that the fact that no guardian ad litem had been appointed might be enough to make any judgment rendered against Cindy Caldwell voidable. (TR-251, 255, 310-313) Yet, Mr. Sullivan himself testified that this technicality was merely a delaying tactic. (TR-378) Even if he was successful in setting aside any judgment rendered against Cindy Caldwell, a new trial would simply bring forth the same evidence and the same tragic result would, in all probability, ensue for the Defendant's insured. (TR-251, 252)

The only reason Mr. Sullivan brought this technicality to the attention of the Defendant's claim manager was that the Defendant had decided from the very start that it was not going to settle the case and, therefore, Mr. Sullivan was placed in a position of having to try to defend the case the best way he could. (TR-370, 371)

Furthermore, on the morning of trial, the attorney for Cindy Caldwell's co-defendant announced that its insurer, Fidelity General Insurance Company, had been placed in receivership and could pay out no money whatsoever. At this point, Mr. Sullivan and the Defendant's claim manager knew that Cindy Caldwell was the only Defendant with any financial responsibility. They knew also that they themselves evaluated the case to be worth

more than their policy limits. Therefore, even if a final judgment against Cindy Caldwell could have been voided, Patricia Benson's attorney would have simply relitigated the suit against their insured Cindy Caldwell, and the evidence would have been the same.

It was at this point that Mr. Sullivan advised the Defendant that, "We have got a problem." (TR-238) Since Patricia Benson's attorney had a "demand letter" on record demonstrating that he was willing to settle within the policy limits (Plaintiff's Exhibit No. 15), he asked the claim manager for authority to immediately settle the case. He was of the opinion that if the case was tried, a verdict in excess of the policy limits would be returned against Cindy Caldwell. (TR-247, 290, 291, 362) The Defendant, knowing that its insured was the only Defendant with any financial responsibility, refused to allow Mr. Sullivan to settle the case for any amount in excess of $5,000.00. (TR-240) This was so despite the fact that Mr. Sullivan felt he could have still settled the case at trial for the policy limits and obtained a release for Cindy Caldwell. (TR-246)

After the Final Judgment of $205,000.00 was rendered against Cindy Caldwell, the Trial Court refused to accept Mr. Sullivan's arguments for setting the verdict aside and denied the post-trial motions. (TR-250, 251) No appeal was taken despite the fact that Mr. Sullivan advised the company that they should either attempt to settle or appeal (TR-253, 255, 357), and despite the fact that he advised the company that there was no reason whatsoever that an appeal could not be perfected. (TR-255, 371)

Prior to trial, Patricia Benson's attorney had offered to settle the case against Cindy Caldwell for the insurance policy limits. (Plaintiff's Exhibit No. 15) At the time of making this offer to settle within the policy limits,

Patricia Benson's attorney was under the misguided impression that the policy limits were only $25,000.00. (TR-235, 236) Indeed, the Defendant's insured, William J. Caldwell, was under the same misguided impression. (TR-239) It was not until the morning of trial that the Defendant told its own attorney that its policy limits were, in fact, $50,000.00 and not $25,000.00. (TR-238, 239, 262)

After the Final Judgment was rendered and Mr. Sullivan's post-trial motions were denied, the Defendant's actions degenerated from what a jury might characterize as negligence to what might properly be characterized as bad faith to such an extent to incorporate willful and wanton misconduct sufficient to sustain punitive damages. At this point in time, the Defendant decided to play upon Patricia Benson's attorney's misconception of the policy limits to avoid making a full payment under its contract of insurance. The Defendant chose to pay off only one-half of its policy limits and left the other half to simply continue as an outstanding judgment against its insured. (The amount of the Judgment, *in excess of the policy limits*, would remain outstanding against its insured also, of course.) Their own attorney, Mr. Sullivan, told the Defendant's claim manager not to engage in such deceit. Yet, the Defendant was determined to institute this fraud against opposing counsel as well as its own insured, Cindy Caldwell. On the 10th or 11th of December, 1970, the Defendant's claim manager called Mr. Sullivan and stated, "We have decided that since Mr. Farish believes the policy limits are $25,000.00 that we are just going to send him $25,000.00 and he will think he got the policy limits." Mr. Sullivan replied, "You can't do that, you can't do that." He informed the Defendant's claim manager, "Look, he is going to file an excess suit against you. . . He is going to find out what the policy limits are and then what are you going to do?" The Defendant's claim man-

ager replied, "We can always pay the other $25,000.00." Mr. Sullivan informed him that those actions were wrongful and they could not expect to simply pay the other $25,000.00 if they were caught. He stated, "No, that's not the thing to do. Now give me some authority and let me go to Farish and settle the case." Despite Sullivan's pleadings for authority to settle the case for $50,000.00 and to allow him to honestly disclose the policy limits to Patricia Benson's attorney, the Defendant's claim manager stated that the company's mind was made up. The attorney then stated, "Well, Joe, you have decided what you are going to do, but I am not going to have any part of it." Mr. Sullivan explained that, "It is just not right and I am not going to have any part of it." Nevertheless, the Defendant's claim manager's mind was made up. He informed Mr. Sullivan, "Well, we are going to do it anyway." He then asked Mr. Sullivan what he should ask for in return for the $25,000.00 check. Sullivan informed him to ask for what was normally asked for when the policy limits were paid off and there remained outstanding an excess judgment. Sullivan said, "Ask for a partial satisfaction of judgment." (TR-256, 257)

Against Mr. Sullivan's advice, the Defendant's claim manager sent to Patricia Benson's attorneys a check for only $25,000.00. The letter accompanying the check requested a partial satisfaction of judgment. On the back of the check, however, the usual release language appeared although the Defendant's claim manager obviously knew that Patricia Benson's attorney would not settle a $205,000.00 Judgment for $25,000.00. Patricia Benson's attorney immediately called up Mr. Sullivan and informed him of the "funny writing" on the back of the check. Mr. Sullivan also knew that Patricia Benson's attorney had no intention of settling a $205,000.00 Judgment for

$25,000.00 and authorized the crossing out of this release language. (TR-258, 261; Plaintiff's Exhibit No. 21)

Mr. Sullivan immediately informed the Defendant's claim manager that he had authorized the crossing out of the "funny writing" so that the check could be negotiated without constituting a release. The Defendant's claim manager made no objection to Mr. Sullivan's authorization of the alteration of the check and agreed to contact the bank so that the check might properly clear. (TR-260)

The Defendant was successful in deceiving Patricia Benson's attorney for a period of time. Patricia Benson's attorney did not learn the truth that the policy limits were actually $50,000.00 and not $25,000.00 until after the instant litigation was filed. (See Plaintiff's Complaint alleging the policy limits to be $25,000.00, R-1-17) The Defendant's own insured, William Caldwell, did not learn the truth regarding his policy limits until approximately thirty days before the trial of the instant litigation. (TR-387)

The attorney who represented the Co-Defendant in the personal injury litigation, was called by the Plaintiffs in the instant litigation to testify as to his opinion of the actions the Defendant engaged in after the post-trial motions were denied. Mr. Samuel Adams stated, "I think that is bad faith. More than that." Q. "What, Sir?" A. "Well, it is an effort to, an obvious effort to deceive you and to attempt to void a judgment they had coverage for, or partial coverage for." (TR-430)

Mr. Sylvan Burdick, a local attorney, was also called by the Plaintiff to testify as to the Defendant's conduct after the post-trial motions were denied. Mr. Burdick testified as follows, "I think at this point they reached beyond any line that could reasonably be drawn and (sic)

inviting further action and exposing their client or their insured to all kinds of problems. I would have to say that I am shocked by this circumstance, I mean violation of what I regard as normal and proper." Q. "Sir, would you say it was even greater than bad faith?" A. "Yes, I hesitate not at all. As we sometimes think of negligence as being carelessness, act of bad judgment, omission, or failure that anyone might perform, that falls, in my opinion, into an area of deliberate behavior which either comes close or crosses the line of criminal behavior in my opinion." (TR-483)

At trial the Defendant failed to call a single attorney to testify that its actions were anything other than willful and wanton bad faith. No attorney or independent adjuster testified in its behalf. The Trial Court, in its Order denying post-trial motions in the instant litigation, stated, "Without going into detail, this member of the Court feels compelled to state that he has not, in his twenty years as a trial lawyer and fifteen years as a trial judge, seen or been aware of so clear a case of bad faith." (R-100)

REASONS FOR GRANTING THE WRIT

The decision of the Trial Court as affirmed by the District Court of Appeal and as allowed to remain in force and effect by the Supreme Court of Florida, raises important and critical questions relative to State Courts' rights to deprive a litigant of Federal Constitutional guarantees. In *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537, 540 (1930), Mr. Justice Stone articulated the guiding precepts relative to this Court's obligation to review State Court decisions which although purportedly founded upon non-federal grounds, involve Federal Constitutional guarantees. "Even though the Constitutional

protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, Constitutional obligations may not be thus evaded."

I

Have the Plaintiffs Been Deprived of Due Process of Law in Violation of Amendment XIV, Section 1 of the United States Constitution?

The State of Florida has the right to set its own procedures to be followed by its State Courts. However, where those procedures violate fundamental procedural due process as guaranteed by the Fourteenth Amendment, this Court has the duty to issue a writ of certiorari and correct this deprivation of a citizen's rights. *Fuentes* v. *Shevin*, 407 U.S. 67 (1973); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). Florida law has long been established that a litigant need not specifically plead punitive or exemplary damages. Mere allegations of gross negligence or oppression tending to show plaintiff's right to recover such damages establish plaintiff's right to proceed to a jury on the issue of punitive damages under Florida law. *Winn & Lovett Grocery Co.* v. *Archer*, 171 So. 214, 222 (Fla. 1936) In the instant case the Plaintiffs sued the Defendant for negligence in Count I of the Complaint and for bad faith in Count II of the Complaint. At trial the enormity of the deceitful actions of the Defendant, as demonstrated by the unrebutted evidence, led one expert witness to characterize the Defendant's actions as falling "into an area of deliberate behavior which either comes close or crosses the line of criminal behavior in my opinion." Even the Trial Court itself, in its Order Denying Defendant's Motion for New Trial, characterized the Defendant's conduct as the worst case of bad faith it had ever seen in

thirty-five years of litigation experience. The Chief Justice of the Florida Supreme Court concurred in the Court's decision to discharge the writ of certiorari as to the Petition for Certiorari filed by Southeast Title & Insurance Company but dissented in the discharge of the writ issued upon the Cross-Petition of the Plaintiffs. The Chief Justice pointed out that this lawsuit from the very start involved the possibility of a recovery of punitive damages since it was grounded in bad faith. (Page A5 of the Supreme Court opinion of April 16, 1975) The Chief Justice further pointed out that the Defendant could not sincerely argue that it was surprised that the Plaintiffs wished to have a jury rule upon the question of punitive damages in view of the fact that prior to trial it had been requested to produce a net worth statement and such a request would put a defendant on notice that punitive damages were involved. (Page A8 of the opinion) The Chief Justice also pointed out that if the Defendant truly wished to rely upon an allegation that it was surprised that punitive damages were involved, then, under Florida law, it was incumbent upon the Defendant to move for a continuance. There is no question that under Florida law, the Plaintiffs were entitled to have a jury determine the question of punitive damages. If the Defendant was surprised, its remedy was not to take from the Plaintiffs their right to a jury determination of the issue of punitive damages, but rather its right to seek a continuance. (Pages A8-A9 of the opinion) A continuance would have not deprived the Plaintiffs of their day in Court. The impact of the State Courts' actions in this case is to deprive the Plaintiffs of the right to a jury determination of their punitive damage claims. The Plaintiffs were entitled to be heard by a jury of their peers on this claim. The determination by the Trial Court as affirmed by the District Court of Appeal and the Florida Supreme Court that the Plaintiffs

would not be given this opportunity to be heard violated fundamental due process and deprived Plaintiffs of a very substantial cause of action. The very nature of due process requires that inflexible and arbitrary procedures established by a state court must not be condoned. Every party must be given a sufficient opportunity to present his claims. Basic procedural due process assures a citizen of the opportunity to present his claims and to have them heard. One of the primary purposes for the due process provisions of the Fourteenth Amendment is to insure abstract fair play to the individual. *Fuentes* v. *Shevin*, supra, page 81.

II

Have the Plaintiffs Been Deprived of Their Rights Under Amendment VII of the United States Constitution to a Trial by Jury on the Issue of Punitive Damages?

The actions of the Trial Court in not allowing the punitive damage claim to proceed to jury determination deprived the Plaintiffs of their constitutionally guaranteed right to a trial on this issue by a fair and impartial jury. There is no question that there was substantial evidence to take the Plaintiffs to the jury on the issue of punitive damages. The Trial Judge himself acknowledged in his Order Denying the Defendant's Post-Trial Motions that he had never seen such conduct in thirty-five years of judicial experience. No expert witnesses testified for the Defendant. The Defendant was unable to obtain a single attorney to come forward and attempt to justify its conduct. Mr. Sylvan Burdick, who testified on behalf of the Plaintiffs, stated that the Defendant's conduct was of such a deliberate nature that it "either comes close or crosses the line of criminal behavior in my opinion". Under such circumstances, there was no justification for the Trial

Court's refusal to allow the Plaintiffs to proceed to the jury on the issue of punitive damages. Taking from the Plaintiffs this right violated Amendment VII to the United States Constitution. *U. S.* v. *Lesher,* 59 F.2d 53 (9th Cir. 1932); *Garrison* v. *U. S.,* 62 F.2d 41 (4th Cir. 1932); *Reid* v. *Maryland Casualty Co.,* 63 F.2d 10 (5th Cir. 1933).

In *Garcia* v. *Queen, Ltd.,* 487 F.2d 625, 628 (5th Cir. 1973), it was held that a trial judge's determination of the issues of liability and damages at a non-jury trial which was supposed to be limited to the issues of insurance coverage was an abuse of discretion and the final judgment was vacated and caused to be remanded. The Trial Judge's actions in this case, in stepping between the Plaintiffs and the jury to whom they had a constitutional right to submit their claim, was also an abuse of discretion and arbitrarily deprived the Plaintiffs of their Seventh Amendment rights.

It is well established that even in the Federal Courts where a trial judge is permitted to comment upon the evidence, some comments may exceed the bounds of permissiveness and deprive a citizen of his rights to a fair and impartial trial by jury. *Town of Bolivar, Tennessee* v. *Kelly,* 69 F.2d 58 (6th Cir. 1934).

The issue of whether the Plaintiffs were entitled to punitive damages was for the jury. The jury and the jury alone was entitled to exercise its discretion in this regard. By depriving the Plaintiffs of the right to a jury determination on the issue of punitive damages, the Trial Court violated the Plaintiffs' Seventh Amendment rights. A writ of certiorari should issue to the Supreme Court of Florida quashing their opinions and directing the Supreme Court to issue an order and mandate directing the Trial Court to grant the Plaintiffs a new trial on the issue of punitive damages.

CONCLUSION

For the reasons stated herein, Petitioners respectfully pray that the Petition for Certiorari be granted and that this Court render an opinion directing that they are entitled to a new trial on the issue of punitive damages.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1973

CASE NO. 72-967.

SOUTHEAST TITLE AND INSURANCE COMPANY,
Appellant,

v.

CINDY CALDWELL, a minor, by her father and next friend, WILLIAM J. CALDWELL, for the benefit of PATRICIA ROBIN BENSON and RAYMOND W. BENSON,
Appellee.

(Decision filed May 21, 1973.)

Appeal from the Circuit Court for Palm Beach County; Culver Smith, Judge.

Edna Caruso and Robert M. Montgomery, Jr., of Howell Kirby Montgomery D'Aiuto Dean and Hallowes, West Palm Beach, for appellant.

Joseph D. Farish, Jr., of Farish & Farish, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

REED, C.J., WALDEN and MAGER, JJ., concur.

APPENDIX B

IN THE
SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1975

CASE NO. 43,929

DCA CASE NO. 72-967

SOUTHEAST TITLE AND INSURANCE CO.,
Petitioner,

v.

CINDY CALDWELL, et al.,
Respondents.

(Opinion filed April 16, 1975)

Writ of Certiorari to the District Court of Appeal
Fourth District

Julius F. Parker, Jr. of Madigan, Parker, Gatlin, Truett and Swedmark; and Edna L. Caruso of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hallowes, for Petitioner

Jos. D. Farish, Jr. and F. Kendall Slinkman of Farish and Farish, for Respondents

PER CURIAM.

The petition and cross petition for writ of certiorari reflected apparent jurisdiction in this Court. We issued the writ and have heard argument of the parties. Upon further careful consideration of the matter, the briefs and record, we have determined that the cited decisions present no direct conflict as required by Article V, Section 3(b)(3), Florida Constitution (1973). Accordingly, the writ must be and is hereby discharged.

It is so ordered.

BOYD, DEKLE, OVERTON and ENGLAND, JJ., Concur

ADKINS, C.J. Concurs in part and Dissents in part with opinion

ADKINS, C.J., Concurring in part; dissenting in part:

I concur in the discharge of the writ of certiorari issued upon the petition of Southeast Title and Insurance Co., but I dissent to that part of the decision discharging the writ of certiorari issued upon the cross-petition of plaintiff Caldwell.

The question involved is whether the trial court abused its discretion in denying cross-petitioner's motion to amend her complaint just before the close of the presentation of her case to add a prayer for punitive damages.

Rule 1.190(a), R.C.P., entitled *Amendments*, sets the general tone of the rules when it states that leave to amend shall be given freely when justice so requires. Rule 1.190(b), R.C.P., provides, *inter alia*, that

> ". . . when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they have been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues."

Granting leave to amend rests in the sound discretion of the trial court, but doubts should be resolved in favor of allowing amendment until it appears that there has been an abuse of the privilege. *Fouts* v. *Morgules*, 98 So.2d 394 (Fla.App.3d, 1957). This is true even though the trial judge is of the opinion that the proffered amend-

ments will not result in the statement of a cause of action. *Peterson* v. *Concrete Construction, Inc.*, 202 So.2d 191, 197 (Fla.App.4th, 1967).

While it is a general rule that cases should be tried upon the issues raised by the pleadings, amendments can be made under the rules at any time, so long as they do not prejudice the opposing party. *Hart Properties, Inc.* v. *Slack*, 145 So.2d 285 (Fla.App.3d, 1962). A litigant therefore has no right to rely upon the pleadings to the extent of believing that certain known facts will not be presented. It is only when new facts are developed under a new theory of the case that surprise can be pleaded. *Hart Properties, Inc.* v. *Slack, supra.* In *Transworld Marine Corp.* v. *Threlkeld*, 201 So.2d 614 (Fla.App.3d, 1967), for example, defendants moved to amend the pleadings to conform to the evidence, pursuant to Rule 1.15(b), R.C.P., [now Rule 1.190(b)]. The motion was made after a jury verdict was rendered in favor of plaintiffs, and sought to amend the answer to include the affirmative defense of statute of frauds. The court held that even if the defense fails to appear from the pleadings, if evidence of such is admitted at trial, then the issue created will be deemed to have been raised and the pleadings may be made to conform thereto pursuant to Rule 1.15(b), R.C.P.

There is no doubt, therefore, that pleadings may be amended before, during or even after the trial. *Atlantic Coastline Railroad Co.* v. *Edenfield*, 45 So.2d 204 (Fla. 1950). Rule 1.190(e), R.C.P. The test is whether the amendment takes the opposing party by surprise. *Atlantic Coastline Railroad Co.* v. *Edenfield, supra*, at 205. Rule 1.190(b), R.C.P.

In *Garrett* v. *Oak Hill Club*, 118 So.2d 633 (Fla. 1960), for example, Mr. Justice Terrell said that amendments

> "[M]ay be made to conform to the evidence as late as or after judgment or decree. This is particularly true if essential to justice or if the presentation of the merits will be more effectively expedited. It is part of what we call liberality of amendments." (p. 635)

There is also authority for the proposition that under the new pleading rules amendment may be allowed even if it changed the legal theory upon which the action was initially based. *Strickland* v. *St. Petersburg Auto Auction, Inc.*, 243 So.2d 603 (Fla.App.4th, 1971). See also *Raggs* v. *Gouse*, 156 So.2d 882 (Fla.App.2d, 1963), where plaintiff, a passenger in defendant's car, sued defendant for personal injury, alleging simple negligence. At the close of all the evidence, and just as the trial judge was about to enter a directed verdict for defendant, since plaintiff was subject to provisions of the Florida guest statute, plaintiff was allowed to amend his complaint to plead gross negligence. This was found to be proper under Rule 1.15(b), R.C.P. No new testimony needed to be taken and the Court's offer of a continuance was waived by the defendant.

The case *sub judice* was an excess judgment suit brought by cross-petitioner Caldwell against Southeast Title and Insurance Company alleging bad faith in failure to settle a law suit between the insured Caldwell and a third party. It is too well settled to require citation that the insuror must act in good faith toward the assured in its effort to negotiate a settlement. Obviously the very nature of the excess judgment suit which is grounded on bad faith gives rise to a possible recovery of punitive damages.

In order to recover punitive damages, however, more than simple bad faith must be shown. The existence of fraud, malice, gross negligence, oppression or like circum-

stances of aggravation are generally required. See 9A Fla.Jur., *Damages,* § 126, at 371. Where malice can be imputed from the defendant's entire want of care or attention to duty, or from his great indifference to the person, property or rights of the plaintiff, punitive damages are allowable; this rule is consistent with the theory that punitive damages are allowed as a deterrent to the commission of similar offenses by others. *Griffith* v. *Shamrock Village, Inc.*, 94 So.2d 854 (Fla. 1957). Thus, while punitive damages need not be specially plead, the elements thereof must be stated in the complaint to the extent necessary to advise defendant that he will have to meet a demand of that kind at the trial.

Malice which permits recovery for punitive damages does not necessarily mean anger or malevolent or vindictive feelings toward the plaintiff, and a wrongful act without reasonable excuse is malicious within the legal meaning of the term. *Richards Co.* v. *Harrison,* 262 So.2d 258 (Fla. App.1st, 1972). Moreover, punitive damages need not flow from an intentional course of conduct or intent to inflict damages, but may also be allowed in such cases where there is the entire want of care which would raise the presumption of a conscious indifference to the consequences of one's actions or inaction. *Richards Co.* v. *Harrison, supra,* at 262. Thus, for example, where the defendant's crew chief failed to make arrangements with the police department to permit plaintiff's salesmen to canvass the city, knowing that a municipal ordinance required all solicitors to carry a permit, which failure resulted in the arrest and fining of the plaintiff, the Court properly submitted the issue of punitive damages to the jury. *Richards Co.* v. *Harrison, supra,* at 262. If there is any evidence tending to show that punitive damages could be properly inflicted, even if the Court be of the opinion that the preponderance of the evidence is the other way, the Court should leave

the question to the jury. *Doral Country Club, Inc.* v. *Lindgren Plumbing Co.,* 175 So.2d 570, 571 (Fla.App.3d, 1965).

The evidence in the case *sub judice* strongly supports a finding of bad faith on the part of the insurance company. There are also additional factors which could support a finding of bad faith and perhaps even malice, or at least conscious indifference to the rights of others. The events which occurred after the original trial in which the jury awarded a verdict of $205,000 for the injured party, Patricia Benson, against cross-petitioner, Cindy Caldwell, are especially revealing. The record indicates that the Caldwell's attorney offered to settle the case within the limits of the policy, originally believed to be $25,000. This offer was, of course, refused before trial, the petitioner, Southeast Title, submitting an offer of $5,000. After the verdict, however, defendant was naturally faced with paying the judgment to the extent of its coverage, i.e., $25,000. However, it was learned that the actual limits were $50,000, not the $25,000 believed by Caldwell and her attorney. Defendant knew of this on the morning prior to trial.

Instead of informing the insured that the actual limits were $50,000, the defendant's agent directed its attorney, against the attorney's advice, to pay only the $25,000. A check for $25,000 was then sent to Caldwell's attorney, the check containing a release form on the back stating the acceptance of this check is a full release.

Regarding these actions by the defendant, one of the witnesses called by the cross-petitioner Caldwell, testified that

> "I think at this point they reached beyond any line that could reasonably be drawn in inviting further action and exposing their client or their insured to

all kinds of problems. I would have to say I am shocked by this performance. . . .

"Question: Sir, would you say it was even greater than bad faith? Answer: Yes, I hesitate not at all. As we sometimes think of negligence as being carelessness, act of bad judgment, omission, or failure that anyone might perform, *that falls, in my opinion, into an area of deliberate behavior which either comes close or crosses the line of criminal behavior, in my opinion.*" Record on Appeal at p. 483.

With this in mind, then the question is whether the issue of malice, etc., was tried by the express or implied consent of the parties such as would allow an amendment at the close of the plaintiff's case.

At the close of the plaintiff Caldwell's case, counsel moved to amend to add the prayer for punitive damages. Evidence as to the same was already in the record. All that remained was to introduce evidence of defendant's financial ability. Was there unfair surprise to defendant in the petitioner's attempt to amend to such extent that defendant would have been prejudiced by the amendment? Evidence of malice was already allowed in the record without objection. The defendant had already been requested to produce a net worth statement putting defendant on notice to be ready to testify as to its net worth; for what possible purpose other than for punitive damages?

Granted, plaintiff had time prior to the motion to amend that counsel could have amended the complaint. But the fact remains that the only issue in the case was bad faith on the part of the defendant. The punitive damage issue did not raise any new or unrelated question for either party to prepare for. Nor did it appear that

the amendment would change or introduce new issues or materially vary the grounds for relief or delay the suit necessarily by requiring a continuance under circumstances which would be unduly prejudicial to the opposing party. *Brown* v. *Montgomery Ward & Co.*, 252 So.2d 817 (Fla.App.1st, 1971).

The proof of malice required for recovery of punitive damages is but one step forward in the proof of bad faith. The defendant would almost be required to prepare for such issues in the defense of the excess judgment suit. In fact, this is precisely how the evidence of malice came into the record, as part of the plaintiff's effort to establish bad faith to the degree required to get past a directed verdict. Moreover, even when the evidence came in without objection, apparently the defendant made no attempt to refute it. Additionally, cases are numerous where the opposing party was granted a continuance to avoid any possible prejudice in situations like these.

Judicial discretion has been defined as

". . . A discretion exercised within the limits of the applicable principles of law and equity, and the exercise of which, if clearly arbitrary, unreasonable, or unjust, when tested in light of such principles, amounting to an abuse of such discretion, may be set aside on appeal." *Carolina Portland Cement* v. *Baumgartner*, 99 Fla. 987, 128 So. 241, 247 (1930).

Moreover,

"Although the appellant is not required to show that the trial court acted willfully, the cases reflect that the trial court's action must plainly appear to have been in effect the imposition of an injustice . . . or that the ruling was erroneous and may well have affected a decision of the jury. . . ." 2 Fla.Jur., *Appeals*, § 328, Note 13, at 696.

This case is different from *Wooten* v. *Wooten*, 213 So.2d 292 (Fla.App.3d, 1968), and *Triax, Inc.* v. *City of Treasure Island*, 208 So.2d 669 (Fla.App.2d, 1968), where the denials of motions to amend to conform to the evidence were found not to have been abuses of discretion. In *Wooten*, the Court denied husband's motion to amend his complaint to include adultery when he did not make the motion until the conclusion of his case, but knew of the allegedly adulterous behavior prior to filing his complaint and had introduced evidence of it in support of his allegation of extreme mental cruelty.

In *Triax*, the denial of the motion was proper where there was nothing in the record from which it could be inferred that a quantum meruit issue had been tried by express or implied consent of the parties. The motion was made seven days after the trial judge had entered judgment for defendant in an action for breach of an oral contract.

Contrarily, in the case *sub judice*, the issues involved in the punitive damage question are so closely related to those in the excess judgment question as to require little or no extra preparation. The defense of adultery in *Wooten* certainly required a wholly different preparation than did mental cruelty. Moreover, a motion to amend seven days after judgment and on an issue not raised in the record as in *Triax*, is quite different from a motion made before the close of plaintiff's case and where there is support in the record.

I would quash that portion of the decision of the District Court of Appeal which affirmed the trial court's denial of plaintiff's motion to amend and remand the cause for further proceedings.

APPENDIX C

IN THE
SUPREME COURT OF FLORIDA

JULY TERM, 1975

CASE NO. 43,929

DCA CASE NO. 72-967

SOUTHEAST TITLE AND INSURANCE COMPANY,
Petitioner and Cross-Respondent,

v.

CINDY CALDWELL, a minor, by her father and next friend, WILLIAM J. CALDWELL, for the benefit of PATRICIA ROBIN BENSON and RAYMOND W. BENSON,
Respondents and Cross-Petitioners.

(Opinion filed October 1, 1975)

Petition and Cross-Petition for Writs of Certiorari
to the District Court of Appeal,
Fourth District

Julius F. Parker, Jr. of Madigan, Parker, Gatlin, Truett and Swedmark; and Edna L. Caruso and Morgan S. Bragg of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hallowes, for Petitioner and Cross-Respondent

Jos. D. Farish, Jr. and F. Kendall Slinkman of Farish and Farish, for Respondents and Cross-Petitioners

ON REHEARING GRANTED

PER CURIAM

This cause was previously submitted to the Court on petition for writ of certiorari and cross-petition for writ of certiorari. These petitions were denied after rehearing was granted, with Adkins, C.J., concurring in part and dissenting in part.

We granted a second rehearing in this cause.

Petitioner and cross-petitioners have sought to establish conflict certiorari from a per curiam without opinion decision of the Fourth District Court of Appeal. We have determined that there is no direct conflict as required by Article V, Section 3(b)(3), Florida Constitution, and we adhere to the original order of this Court in this cause denying petition for writ of certiorari and cross-petition for writ of certiorari.

Our review of the record, however, compels us to suggest that the Insurance Commissioner review this cause pertaining to the actions of Southeast Title and Insurance Company in representing its insured.

The writ is hereby discharged.

It is so ordered

OVERTON, ENGLAND, SUNDBERG and HATCHETT, JJ., Concur

ADKINS, C.J., concurs in part and dissents in part in accordance with his opinion filed herein on April 16, 1975.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari and Appendix has been furnished Julius F. Parker, Jr., Esq., Madigan, Parker, Gatlin, Truett & Swedmark, P.O. Box 669, 318 N. Monroe Street, Tallahassee, Florida 32302 and Attorney Edna L. Caruso, Howell, Kirby, Montgomery, D'Aiuto & Dean, 2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33402, Attorneys for Respondent, by mail, this 4th day of December, A.D. 1975.

JOS. D. FARISH, JR.
Attorney